

Jeff Trueman and Patrick Coughlan: Managing multiparty construction disputes

By: Commentary: Jeff Trueman and Patrick Coughlan © August 12, 2020

Litigated construction disputes often involve numerous parties, such as developers, general contractors and various subcontractors, architects, engineers, and perhaps financial institutions and public entities. Numerous claims, cross-claims and counterclaims are asserted, often arising under the contract and/or professional negligence theories.

This makes for a dense maze of claims and defenses. To be successful in resolving these kinds of cases, mediators need a different sort of strategy to manage the complexities that are not as prevalent in smaller, more compact disputes.

The approach: co-mediation

In cases involving more than four parties, two mediators may be needed to make the process more efficient. Two mediators can gather information among a group of similarly situated parties more quickly than one. This results in a quicker exchange of information between parties.

It also brings twice the problem-solving expertise to bear on finding a viable resolution. The additional fees incurred by a second mediator are nominal compared to the time saved with one mediator who faces the challenge of interacting with the entire roster of parties and their representatives.

Mediating online

The authors have experience resolving construction disputes online with video conferencing platforms such as Zoom — even with as many as 30 parties. Critical to the process are pre-mediation conferences that familiarize participants with the platform without the pressure of performing in an actual mediation.

Early conversations about protocols concerning information security and confidentiality, as well as the details of the case, set the stage for a meaningful mediation that increases the chances of resolving the dispute. These conversations may also reduce or eliminate the need for opening statements.

Mediators have an ethical obligation to competently operate all technologies that facilitate settlement discussions. Furthermore, mediation is intended to serve the interests of the parties, and toward that end, the mediator is responsible for helping the parties make informed choices about which technologies to use.



Competency in managing the technology is even more important in large-scale cases where the co-mediators may need to use two different Zoom accounts in order to flexibly move in and out of breakout rooms (the authors have asked for technical guidance on this issue from Zoom but have not received a response).

Road map to resolution

Most mediators have a rough plan of how the mediation will likely come together (or at least they should) after reviewing mediation statements and notes from private conversations with counsel before the mediation.

In construction cases, the main question for resolution is, "How will the money flow?" From what source (or sources) to whom? Mediators may surmise how much moving parties will accept and how much can be raised from defending parties, but none of that matters until parties and counsel confirm what they will offer or accept.

In general, mediators are always looking for a workable solution based on conversations (sometimes heated) that readjust the expectations that counsel and parties have for the litigation.

Flexibility is key; the road map can and will change as the process unfolds. Like most civil mediations, the process takes time to move from what parties want to what they will accept.

Construction mediators cannot be afraid of sharing their opinions about the merits of claims and defenses. They are under time pressures to keep the process moving along – which is why co-mediation can be so helpful when difficult discussions need to occur.

Organization

Mediators of large-scale construction disputes must be highly organized. A summary of the competing claims and defenses is an indispensable tool for organizing the points of disagreement and where potential areas of compromise might be found.

It should cross-reference responses from each party so that caucus conversations can progress and build on information gathered along the way. Also, mediators need to create and maintain a contact sheet of all participants, including their cellphone numbers, e-mail addresses, and when they will participate.

Term sheet

Although mediation participants may not be in the mood for it after extended settlement talks, the mediator must assist the parties and counsel in preparing a term sheet before ending the mediation.

Although detailed settlement documents will be executed at a later time, the term sheet must list the material terms of the settlement accurately, including a provision that nothing else is required to fully and finally resolve the litigation.

It should also state that any party can enforce the term sheet in the event they cannot agree on the final terms as stated in a more fully documented settlement agreement or release.

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